THE ARBITRATION DEBATE

In February 1986 the Bar Association forwarded to the Attorney General, the Honourable T.F. Sheahan MP, a submission in support of the Bar Council's proposal that Part 72 of the Supreme Court Rules be disallowed by the State Parliament. On 18 March 1986 His Honour, Mr Justice Rogers delivered a paper to the Commercial Law Association in which he commented upon the Bar's attitude to Part 72. The gist of the Bar's submissions and His Honour's comments are set out hereunder.

The Bar's Case: Validity.

Section 124(2) of the Supreme Court Act as amended in 1984 provides that:

The Rules may make provision for or with respect to: (a)the cases in which the whole of any proceedings or any question at issue ... may be referred by the Court to an Arbitrator..."

Rule 2(1) of Part 72 of the Supreme Court Rules promulgated late in 1985 provides that the power to refer to arbitration may be exercised "in any proceedings in the Court". The only limitation on this power is that it cannot be exercised in relation to cases to be tried by a jury (Rule2 (2)).

Rule 2(1) in providing, subject to Rule 2(2), that the power may be exercised in the cases selected by the Court in its discretion and acting possibly of its own motion, does not "make provision for...(a)the cases" in which the power may be exercised in accordance with Sec.124(2).

The point is covered by the decision of Jacobs J. in *Baker v. Gough* (1962) 80 WN 1263 at 1270. In that case Jacobs J. had to consider the validity of an ordinance passed by the Synod of the Diocese of Sydney pursuant to the 21st Constitution in the Schedule to the Church of England Constitutions Amendment Act, 1902. The 21st Constitution so far as relevant provided:

"The Synod of each diocese shall have power to determine by ordinance **in what cases** the licence of a clergyman licensed within the diocese may be suspended or revoked"

At p.1270 Jacobs J. said:

"...my view is that it is not an expression by Synod of a case in which the licence of a clergyman within the diocese may be suspended or revoked to say that it may be revoked at the will or pleasure of the Bishop. No case is thereby expressed but the power is in effect delegated to the Bishop of the Diocese or the Archbishop as the case may be to determine the case in lieu of the Synod itself. I do not think that this can be done."

An ordinance of Synod represented a form of delegated legislation under the authority of an Act of the State Parliament in all respects analogous to rules of Court made by a committee of judges under the Supreme Court Act. It is clear that the reasoning of Jacobs J. is directly applicable to Rule 2(1) of Part 72.

Accordingly, Rule 2(1) of Part 72 is ultra vires the Rules Committee. The invalidity of Rule 2(1) results in the whole of Part 72 being invalid. The provisions are inseverable because if no power to refer exists under the rules there will be nothing for the other rules to operate on.

Problems in Principle:

The Association firmly holds the view that it is fundamental to our system of government and of justice that a citizen should be entitled to have his dispute resolved by the courts of the land, openly, in accordance with the law, and with the protections which are traditionally built into the court system including the right to legal representation. The Association is unimpressed by arguments that the power to refer matters to arbitration or to court experts has existed for many years (Arbitration Act, 1902 s.15). Its disuse is eloquent evidence of its inutility. With our courts and judges under scrutiny, and even attack, as perhaps never before, the view of the Association is that nothing should be done to undermine public confidence in the judiciary or to detract from its traditional role. With this in mind, it is inappropriate to give power to judges to decline to hear cases brought to the court by citizens.

The following points of principle are also involved in Part 72 as presently drafted:

1. The power of the courts to appoint a particular arbitrator or referee and fix his fees. This gives the court a power of patronage which is quite undesirable.
2. The power to appoint a judge, master, registrar or other officer of the court as an arbitrator or referee. Nothing could be more calculated to undermine public confidence in the role of the judiciary and the courts. It is one thing to have an official referee or referees appointed publicly to undertake such tasks generally. It is quite another to have ad hoc appointments of individual judges or court officers.

3. The power of the court to act "upon its own motion" in rules 2, 10 and 13.
4. The abandonment of the rules of evidence and procedure provided by rule 8(2) of the rules.
5. The extraordinary power contained in rule 8(5).
6. The absence of criteria and the unrestrained nature of the discretions conferred upon the court.

The fact is that, save in certain limited circumstances, arbitration has not been popular in this State, or indeed, in this country. It is very expensive — not only because of the necessity to pay for all facilities including the arbitrators, but because in practice arbitrations tend to be drawn out and cumbersome. They are also a fertile ground for feelings of injustice in the result. Procedures are often lax, the knowledge and ability of arbitrators is uneven, and even if reasons for a decision are given, it is extraordinarily difficult to test those reasons in court. If access to the courts in the course of an arbitration is denied, there is great scope for injustice and the appearance of injustice — on the other hand if access to the court is available there will almost inevitably be applications to the court of one sort or another which are costly and time consuming. All this shows the real practical difficulties in a hybrid situation.

Hitherto, the courts in Australia have been most reluctant to order arbitration, even on the application of one of the parties, where it is not the subject of consent. *Honeywell Pty Limited v Austral Motors Holdings* (1980) Qd.R 355; *Taylor & Sons Pty Limited v Brival Pty Limited* (1982) V.R. 76; *Silk v Eberhardt* (1959) QWN.

Indeed, even consent arbitrations have led to their share of problems. The sole exception to this is a recent decision of a judge of a New South Wales Supreme Court, a judge who was a member of the Rule Committee which passed these rules, in which he discussed the rule herein in question (*Qantas Airways Limited v Dillingham Corporation December* 5 1985 Rogers J.). In the view of the Bar Association the philosophy expressed in this judgement is out of step with the views of other courts in Australia and other judges, and it is not in accord with contemporary commercial and political reality.

The Effect of an Order upon Appeal Rights:

The Judge having appointed himself as arbitrator (of his own motion) can then report to himself as Judge and of his own motion adopt his own report, although neither party is satisfied with it (Rule 13).

The powers of the Court of Appeal to interfere on appeal from an order adopting the arbitrator's report may be very limited. Since the rules of procedure and evidence may have been dispensed with, there may be no transcript of evidence. If a Judge as referee has "informed himself" in relation to a matter otherwise than in accordance with the evidence called before him by the parties, there may be no material before the Court of Appeal which would enable that Court to review the Judge's decision on that matter.

In this way the rights of the unsuccessful party to appeal from the decision on the merits, while preserved in form, may be effectively destroyed in substance.

The same position would pertain where a Judge adopts (or varies) a report from another referee or arbitrator.

The Suggested Precedents:

(a) S.15 Arbitration Act, 1902.
(i) The section only applied to limited and defined classes of case.
(ii) It required application by one party.
(iii) The reasons for judgement of the High Court in *Buckley v Bennell* 140 CLR 1 contain some discussion of the utility of a power in the Court to refer cases to arbitration under the control of the Court. At p.21 Stephen J. said:

"...when the compulsive power...is exercised the legal rights and obligations of a party to litigation then being determined by extracurial arbitral process, the resultant award will attract to itself all that relative immunity from judicial review which surrounds a conventional award. This immunity is well enough in a case of a conventional award, being explained by the consensual character of conventional arbitrations. But in the compulsory reference the consensual element is wholly absent. The party, whether plaintiff or defendant, will never have consented to any such determination of his rights or obligations but will nevertheless find himself denied judicial review of an award which he may regard as palpably wrong in fact or in law."

To some extent in this passage Stephen J. was dealing with the consequences of an interpretation given by the Full Court of the State to the predecessor of Section 15 of the Arbitration Act 1902 and the undesirable consequences which flowed from this interpretation. Nevertheless the passage contains a clear and powerful statement of the reasons why parties should not be forced, without their consent, to arbitration when this would have the effect of depriving them of their right to have their cases heard in accordance with law.

In this same case Jacobs J. said at p.37:

"Parties to an action do not often want to forgo the rights of a litigant to have questions determined according to law correctly applied, including questions of evidence. More importantly, the Court will hardly be prepared to compel parties to forgo its effective control and supervision to proceedings commenced before it in favour of a determination subject to the very limited powers of review which the Court has in the case of an arbitration by consensual submission."

It will be seen from these passages, and they are consistent with the whole of the majority judgements, that they provide no support for the provisions of Part 72 in their present form. In fact the judicial philosophy expressed in the quoted passages is directly opposed to some of the fundamental provisions of Part 72.

It is of concern that a judge as arbitrator could, of his own motion, direct the reference to be heard by himself, in whole or in part outside New South Wales, thus adding further to the expense and inconvenience of the parties.

Summary of his Honour, Mr Justice Rogers' paper — "Business Disputes made easier."

His Honour pointed out that Section 15 of the now repealed Arbitration Act, 1902, gave power to the Court to order the whole cause or any issue to be sent to

arbitration if all the parties consented or:

"If the cause or matter required prolonged examination of documents or any scientific or local investigation which, in the opinion of the Court, could not conveniently be dealt with by the Court or, if the dispute was wholly or in part matters of account, without the consent of the parties."

The Commercial Arbitration Act, 1984, which, his Honour said, was designed to return to the original concept of arbitration as a swift, informal and cheap determination, did not repeat Section 15 of the 1902 Act. However, at the same time that it was passed, Section 124 of the Supreme Court Act was amended to give the Rule Committee power to make rules prescribing the cases or questions which may be sent to arbitration. Pursuant to that power, the Rule Committee made Part 72 of the Supreme Court Rules which had now been attacked by some members of the Bar Council. His Honour criticised the suggestion that the power conferred on the Court to appoint of its own motion a court expert was "some great leap into the unknown by adventurous spirits" as failing to take into account recommendations to that effect by the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence (1982) and rule 706 in the US Federal Rules of Evidence, 1975.

He rejected the proposition that Part 72 was ultra vires as being based on the text of different legislation and totally overlooking the history of Section 124(2).

Dealing with the article in *Bar News* which suggested that an order should never be made where neither party desires it, his Honour referred to the decision in *Tylors (Aust.) Limited v. Macgroarty* (1928) St.R.Qd. 170 in which the trial Judge ordered that the dispute be sent to arbitration because he thought the course would save expense to the parties and lead to a more satisfactory determination of all matters in dispute.

The trial judge reviewed the historical evolution of the power to act without the consent of the parties. In 1921 power was conferred on the Supreme Court to make rules empowering a judge either generally or in a particular case to refer any cause or matter to arbitration. The rule made in exercise of this power gave the judge power to refer any case of his own motion. The Full Court affirmed his judgment (ibid, at p.371). His Honour pointed out that more recent single judge decisions which were referred to in the summer issue of *Bar News* failed to refer to *Tylors Case*.

His Honour also pointed out that in *Buckley v. Benell Design and Construction Pty Limited* (1978) 140 CLR 1, Jacobs J. (with whom Murphy and Aickin JJ. agreed) said (p.37):

"The power to refer should have been one which the Court would frequently exercise."

He attributed the rare use of Section 15 of the 1902 Act to an interpretation given to the Section some 40 years earlier which was reversed by the High Court in *Buckley v. Benell.*

His honour also pointed out that the power to appoint a judge as an arbitrator existed in the United Kingdom where it was sharply favoured by the legal profession.

When all was said and done, his honour said history showed that there were cases which should be sent to arbitration for the benefit of all concerned and that, provided care was taken, the provision would serve the interests of justice.

THE BAR v THE LORD CHANCELLOR

In February 1986 the English Bar took legal action against the Lord Chancellor, Lord Hailsham, in the High Court for judicial review of the Lord Chancellor's decision to increase the fees payable to barristers under the Legal Aid in Criminal Proceedings (Costs) Regulations by no more than 5 per cent effective from April 1, 1986. The Bar sought a declaration that the Lord Chancellor's decision was unlawful and that, before making such regulations, the Lord Chancellor had been and remained obliged to consult and negotiate with representatives of the Bar.

The case commenced on March 20 before Lord Lane, Lord Chief Justice, Mr Justice Boreham and Mr Justice Taylor.

The background to the case is to be found in the Legal Aid and Advice Act, 1974 which required the Lord Chancellor in fixing scales of legal aid fees to pay a fair remuneration according to work done. Since 1974 fees had only risen annually by a small percentage, apparently adopted by reference to the rate of inflation. The 1985 increase was imposed on the Bar under protest and, at the time, the Lord Chancellor said he would welcome an in-depth examination of the remuneration and expenses of the Bar. The Bar commissioned Coopers & Lybrand to do the study. It was understood by the Bar that the study would be considered by the Lord Chancellor and discussed with the Bar and form a basis for negotiation between the Bar and the Lord Chancellor concerning the future revisions of the legal aid scales, including that to take effect in 1986.

The Times (21 March 1986) described the work done by Coopers & Lybrand and the report produced as follows:

> "Twenty four sets of chambers in London and in other cities were surveyed. They were doing largely but not entirely criminal work. They made regular returns to Coopers & Lybrand over 12 consecutive working weeks of barristers of five to nine years' seniority and of 10 to 15 years, who made individual returns.
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> To avoid the possibility that an individual study might be of an under-employed barrister, Coopers & Lybrand created a model barrister who was engaged solely on that type of work, who was assumed to be handling a mix of cases but was someone who was working as hard and often and as efficiently as any barrister who could properly be expected to work throughout the year.
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> The result to which they came was that on the scale of 1984-1985 the median of five-to-nine year barristers in London would have an annual income of about 12,500 Pounds before tax, and for those of 10 to 15 years' call the figure would be 15,000 pounds before tax. In the provinces the estimated income would be slightly less."

Paragraphs 16 and 17 of the summary of their report read: